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Supreme Court of the United States

OCTOBER TERM, 1963

No. 38

POLAR ICE CREAM AND CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY.

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Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY.

OPINION BELOW.

The opinion of the District Court (R 181-189) is reported at 208 Fed.Supp. 899.

JURISDICTION.

The Opinion and Findings of Fact and Conclusions of Law and the Judgment (R 189) of the District Court were entered on July 26, 1962, and Notice of Appeal was filed by Appellant on September 21, 1962 (R 190). The Jurisdictional Statement was filed and the case was docketed on November 19, 1962. Motion to Affirm was filed by Appellees, and an Order extending the time in which to file Brief in Opposition to Motion to Affirm to and including February 22, 1963, was entered on January 29, 1963. The Brief for Polar Ice Cream & Creamery Company opposing Motion to Affirm was filed on February 21, 1963, and an Order noting probable jurisdiction was entered on March 18, 1963.

A civil action, required by 28 U.S.C. 2281 to be heard by a District Court of three judges, was brought by Polar Ice Cream & Creamery Company, and the Complaint raised the issue as to whether or not the Florida Milk regulatory scheme violated the Supremacy Clause of the Constitution of the United States, insofar as it related to the sale of milk on a military reservation exclusive jurisdiction to which had been ceded to the United States of America, and also whether the regulatory scheme was in violation of the Commerce Clause of the Constitution of the United States, and whether the regulatory scheme burdened the United States in the exercise of its procurement policy for the Armed Services. A direct appeal to this Court was taken under 28 U.S.C. 1253. *Paul vs. United States* .... U.S. ...., 9 L. Ed. 2d 292, 83 S. Ct. 426, *Florida Lime Growers v. Jacobson*, 362 U.S. 73, *Pacific Coast Dairy v. Dept.*, 318 U.S. 285.

STATUTES AND REGULATIONS INVOLVED.

UNITED STATES:

Constitution of the United States—Article I, Section 8, Clause 3; Article I, Section 8, Clause 17; Article VI, Clause 2;

10 U.S.C. 2301-2314; Armed Services Procurement Regulation.

FLORIDA:

Florida Milk Act, Chapter 501, Florida Statutes;

Florida Milk Commission Rule 220-1.05 Base Fixing Plan;

Florida Milk Commission Rule 220-6.18 Milk Marketing Areas—Generally;

Chapter 25, §1 and §3, Laws of Florida, 1845, Pages 42, 43, and 44; Florida Statutes, 1961, Page 3.

GEORGIA:

Act No. 373, Georgia Laws of 1927, Pages 352 and 353;

Act No. 851, Georgia Laws of 1953, Pages 264 and 265.

The pertinent provisions of the Constitution of the United States are set forth in Appendix "A", *infra*, Page 47.

The pertinent Federal statutory provisions are set forth in Appendix "B", *infra*, Pages 48 and 49.

The pertinent provisions of Armed Services Procurement Regulation are set forth in Appendix "C", *infra*, Pages 50 through 61.

The pertinent Florida statutory provisions and milk regulations are set forth in Appendix "D", *infra*, Pages 62 through 84.

The pertinent Georgia statutory provisions are set forth in Appendix "E", *infra*, Pages 85 through 88.

QUESTIONS PRESENTED.

One.

Whether Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out-Of-State Milk Into Florida In Violation Of The Commerce Clause Of The Federal Constitution.

Two.

Whether Florida Can Enforce Her Minimum Producer Price Regulations And Distributors' Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs And Post Exchanges.

STATEMENT.

This is a direct appeal by Polar Ice Cream & Creamery Company (hereinafter sometimes referred to as Polar) from the Judgment of a Three-Judge District Court convened in the Northern District of Florida, Tallahassee Division. Injunctive relief from the regulatory orders and minimum producer price regulations and distributors' privilege tax was sought by Polar Ice Cream & Creamery Company, and denied by the District Court.

Polar contended that the regulatory scheme and the tax imposed on milk sold by it as a distributor burdened

the flow of interstate commerce, in violation of the Commerce Clause of the Federal Constitution, and that the scheme, as applied to milk sold on military reservations exclusive jurisdiction to which had been ceded to the United States, violated the Supremacy Clause of the Federal Constitution. Polar also contended that such scheme was contrary to the Federal Procurement Policy, as applied to sales to the United States at the United States Navy Mine Defense Laboratory, exclusive jurisdiction to which had not been ceded to the United States, as well as to Fort Benning, Georgia, Tyndall Air Force Base (Panama City, Florida), and Pensacola Naval Air Station, exclusive jurisdiction to which had been ceded to the United States.

Polar Ice Cream & Creamery Company is a Florida corporation, with its plant and main place of business in Pensacola, Florida, sixteen miles from the Alabama border. (R 123.) Polar is in the business of purchasing raw milk and processing and selling it to military bases, consumers, and dealers. (R 123.) Its total annual sales average five million gallons. (R 142.)

1. Proceedings Below.

A complaint and an amended complaint were filed on behalf of Polar (R 1, 34). The appellees, in their Answer, (R 89), denied the allegations of the complaint that the Orders of the Florida Milk Commission issued in furtherance of its regulatory scheme, violated the Commerce Clause and the Supremacy Clause of the Federal Constitution. The lower court found that testi-

mony was taken and arguments heard with reference to the following issues:

(1) Whether Chapter 501, Florida Statutes, and the regulations and orders of defendant, as applied to milk delivered by plaintiff to military reservations, are constitutional.

(2) Whether provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, impose an undue burden upon interstate commerce, and are therefore unconstitutional.

(3) Whether the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the defendant, as applied to plaintiff, violate his constitutional rights of freedom of contract, due process, and equal protection of the law. (182.)

2. Opinion of the District Court.

The District Court refused to grant the injunction prayed for by Polar, and in response to the first issue as set forth above, found that the privilege tax of 15/100 of 1¢ per gallon levied pursuant to §501.09, Florida Statutes, was not a revenue raising device, but was in the nature of a regulatory fee based upon the privilege of doing business in the State of Florida and was not a tax upon milk. The Court further found that such tax did not impose an undue burden upon interstate commerce, and that the imposition of the fee upon Polar was proper, even though it delivered milk to United States military

installations. The Court cited *Texas Company v. Brown*, 258 U.S. 466, and *Baldwin v. Seelig*, 294 U.S. 511, in support of its conclusions. (R 183.)

The District Court found that the regulations and orders of the Florida Milk Commission did not violate the Federal Procurement Statute, and that the case of *United States v. Paul*, 190 F.Sup. 645, which was then pending in this Court, was not applicable, in that there was no showing of any restriction placed upon the price paid by the Federal government for milk purchased for military installations (R 183, 184).

The District Court found that the provisions of Chapter 501, Florida Statutes, and the regulations and orders of the Florida Milk Commission did not place an undue burden upon interstate commerce, and that the base plan as set up by the Milk Commission regulations requiring Polar to purchase all the milk supplied by its Florida producers before purchasing out of state milk did not operate as a restraint of trade in interstate commerce (R 184). The Court further found the case of *Baldwin v. Seelig*, 294 U.S. 511, to be inapplicable (R 185), and found that the Milk Commission did not attempt to regulate the price which Polar pays its out of state producers, nor did the regulations restrict Polar from purchasing out of state milk in any amount or for any price. (R 186.)

3. Background.

Polar's sales to military installations are a significant part of its business. Exhibit "E" to the Complaint

(R 20) was a copy of the Invitation, Bid and Award of the contract to supply dairy products to Fort Benning, Georgia, in an estimated amount of $1,491,110.80. The contract was introduced into evidence (Pl. Ex. 1; R 124, 193). The bids were received and opened at the Purchasing and Contracting Office, Fort Benning, Georgia. The dairy products were also delivered to Fort Benning, Georgia. (R 120.) The contract for milk for troop issue in three or five gallon containers, in an estimated quantity of 1,180,000 gallons, was at a price of 58¢ per gallon (R 209). Polar also had a contract with Tyndall Air Force Base, Florida, the Invitation, Bid and Award being attached as Exhibit "I" to Polar's complaint (R 23). This contract was received in evidence as Plaintiff's Exhibit 2 (R 124, 243). This contract called for delivery of whole, fresh milk in five gallon dispenser cans at 60¢ per gallon (R 248).

The award of the contract which Polar had with United States Navy Mine Defense Laboratory was attached as Exhibit "H" to Polar's complaint (R 30) and provided for delivery of milk in five gallon cans at a unit price of 60¢ per gallon (R 31). Polar also had a contract with the Pensacola Naval Air Station for delivery of milk to the Officers' Club and the Navy Exchange (R 124).

Fort Benning, Georgia, Tyndall Air Force Base, Florida, and the Pensacola Naval Air Station, Pensacola, Florida, are all located on land exclusive jurisdiction to which has been ceded to the United States. (R 294-301; R 310-336.)

Polar has customarily purchased approximately 30% of its total supply of milk from Florida producers and the remaining 70% from producers in other states (R 132).

In the past, at certain times of the year, Polar's Florida producers have provided enough milk to equal the milk utilized by Polar in Florida as fluid milk, exclusive of special categories (equivalent to Class I) and at other times their deliveries have fallen short of this need. Consequently, at certain times of the year Polar has been obliged to use out of state milk to supply the Class I needs of its Florida customers. More frequently, it has been obliged of necessity to use out of state milk to satisfy its need for lower classifications of milk.[1]

Polar's customary arrangement with the Florida producers from whom it purchased milk was, prior to regulation by the Florida Milk Commission, to pay 61 cents

[1] A word about the classification of milk is in order at this point. Milk utilized by the consumer in fluid form (that is, generally, for drinking) commands a higher price than milk of identical quality which is used to make manufactured products of milk such as butter, cottage cheese, ice cream, etc. Accordingly, the processor or distributor of milk is able to pay the producer a higher price for milk which he, in turn, sells for utilization in fluid form. Therefore, most milk pricing systems require milk to be classified according to its use (Class I being, in general, fluid milk used by consumers) and a higher price to be paid for Class I than lower classes even though there is no difference in the quality of the milk. Problems of allocation which are involved in this case arise in the case of a distributor who sells milk both in fluid form and in manufactured form, and must thus pay for some milk at Class I prices and some at lower prices. Allocation is necessary to determine how much of the milk delivered by an individual producer is to be allocated to Class I (that is, treated as if it were sold in fluid form) and thus entitled to the Class I price and how much is to be allocated to lower classes.

per gallon for a fixed quantity of milk and $4.00 per hundred-weight (35.5 cents per gallon) for all milk beyond that quantity. (R 135.) Payment was not made according to the Class (which is to say, the utilization) of the milk (R 132, 135), and Polar was hence free to make a Class I utilization of milk purchased at the 35.5 cent price. The milk which Polar purchased in Alabama and elsewhere was purchased at prices on occasion as low as 30 cents per gallon. (R 127.)

On November 21, 1961, the milk producers in the four Florida counties which are westernmost in the state (Escambia, in which Pensacola is located, Santa Rosa, Okaloosa, and Walton) by vote placed that area, which is now termed by the Commission the Pensacola Milk Marketing Area, under the control of the Florida Milk Commission. By virtue of the terms of Section 501.20 of the Florida Statutes, neither the Alabama producers who regularly supply, through Alabama and Florida distributors, a large part of the year-round needs of the Pensacola area nor the Pensacola area distributors within and without the state of Florida, were permitted to take part in this vote.

Shortly after November 21, 1961, the Commission began to enforce against Polar a threefold scheme of regulation. This scheme was designed to guarantee to Pensacola, Florida producers, regardless of the play of economic forces, and regardless of competition from without the state, that they could sell *all* of their milk at a higher price than that paid to any other group of producers in the United States, even for the Class I portion of the latter's sales.

The first step in the fulfillment of the Commission's regulatory scheme was to fix the price for Class I milk at the level of 61 cents a gallon, the highest price in the nation (R 129, 152).

This was done by the simultaneous adoption of emergency (R 58) and permanent (R 64) price orders which were to be effective on January 18, 1962, and March 4, 1962 respectively. (At R 61 the order defining the classifications of milk in these orders appears.)

Having pegged the Class I price at the highest level in the United States, the Commission took the second step in its scheme, which was to ensure, through an allocation plan, that all of the milk delivered to distributors in the Pensacola area by Florida producers would be paid for at this Class I price, even though a substantial amount of milk sold by Polar was perforce utilized in lower class channels. The allocation plan was designed to make certain that the Florida producers would not be paid what amounted to a lower "blend" price (that is, a blend of the Class I and surplus price) and to that end provided that all of the Class I sales up to the amount of the Florida producers' deliveries would be allocated to them to the exclusion of the other suppliers of milk for the Pensacola area. Conversely, it provided that the Class II and other lower Class sales of which Florida producers were formerly absorbing a fair share, would be allocated to the out of state milk purchased by Polar and other distributors.

The allocation plan came into effect in an irregular manner. As is revealed by the Commission's order

Pen-2 (R 49), the Commission contemplated a system of allocation by which each of a distributor's producers would be assigned a "base", "earned base" or "base percentage," which would be a right to have his deliveries of milk paid for at Class I prices up to a certain percentage of the gallons of milk sold in Class I channels. For example, if a producer had a base of 2%, then all of the milk which he delivered to his distributor would be paid for at Class I prices as long as it did not exceed 2% of the milk sold by the distributor in Class I channels. Order Pen-2 purported to freeze these percentages, but the applicability of the order was uncertain in view of the fact that at the time of its adoption (January 25, 1962) there were no such formal percentages or bases in effect, the area having been free of Commission control for more than four years. (R 151.) Furthermore, there was not even any order explaining the extent of the rights which the holder of a base percentage would have, or what exactly a base percentage was.

Accordingly, in addition to order Pen-2 it was necessary to have an order establishing the base percentage system. Such an order was ultimately adopted by the Commission on October 25, 1962 (after the conclusion of this case in the trial court) as Rule 220-1.05 and, along with the allocation order, (Rule 220-6.18, Appendix D) which has a similar effect (paragraph 1 (g)), it is set forth in Appendix D to this brief so that the court may be informed and take judicial notice of it if it so desires.

However, before the adoption of the base and allocation orders, the Commission had achieved the same result by an ad hoc order applied solely to Polar. This order took the form of a letter to Polar's Florida producers with a copy directed to Polar. (R 48.) It asasigned percentages to Polar's Florida producers, totalling 100%, and gave this explanation of the method of calculating these percentages: "We have used your 'pounds of milk' base, that you had established with your plant [that is, Polar], and converted it into a 'base percentage'. This means that your base per cent remains the same for the year, and entitles you to that percentage of the Class I milk sales each month." Thus, the Commission had taken the number of pounds of milk that Polar had agreed to pay each Florida producer for at a fixed price, added them up, and determined what percentage each producer had of the total. The Commission had then declared that this percentage would be applied to the "Class I milk sales each month." The relationship of one Florida producer to another was preserved thereby but in the aggregate their rights were greatly increased for although they then delivered only 30% of Polar's supply, they were thereby given a right to 100% of Polar's Class I sales.

The intent of the whole regulatory scheme was laid bare by the Commission's lawyer in his argument to the Court. He referred (R 169) to "distress milk" coming from Wisconsin (as to the purchase of which there was no evidence in the record) and said that "if the distributor goes along and uses his base relationship or whatever it was with his producers, local producers,

until a distress situation existed in Wisconsin and then said, no, . . . [there is] just cause [for rejecting the producer's milk], we don't want your milk any more,"—the producer could not sell his milk elsewhere, and "by the time the distributor then would return for the wholesome supply of milk [in Florida] the producer economically would not be there to submit the milk to him." (See also R 146-148.) Although the statement rests upon faulty premises, that the intent of the regulatory scheme was to protect local producers from the competition from out of state imports seems clear enough. That the base order made no distinction between imports of distress milk, milk from regular out of state suppliers of the Pensacola market, or any other type of milk is clear. Of course, nothing in the record shows what, if any, percentage of Polar's milk was distress milk.

The third aspect of the Commission's scheme of regulation, was the enforcement of two Sections of the Florida Milk Control Law, Sections 501.05(3) and 501.09(3)(a), in order to forestall any attempt of Polar or other distributors to relieve themselves from the onerous regulation by reducing their purchases of milk from Florida producers. These sections, which are set forth at pp. 64 through 66 Appendix D, provided respectively that a distributor could neither terminate his relationship with his producers nor cut down the amount of milk received from them without showing just or reasonable cause, and, in the case of termination, receiving Commission approval. The attorney for the Commission admitted that a desire to purchase milk elsewhere would not constitute "reasonable" or "just" cause. (R 168, 169.)

Obviously, the enforcement of these statutes, in the manner they were interpreted, was a vital part of the Commission's plan to provide a captive market, at exorbitant prices, for the Florida producers, for without such enforcement the distributor would be free to escape the onerous regulations by moving some or all of his business to other states.

The Commission enforced these statutes against Polar even before its base fixing plan had come into effect, by demanding that it pay its producers an additional $18,556. (R 42-47.) See also the testimony of Mr. Fisher at R 144.

SUMMARY OF ARGUMENT.

The Court has jurisdiction of this direct appeal under 28 U.S.C. §1253. Direct appeal lies under that section from a suit required to be heard by a District Court of Three Judges convened under 28 U.S.C. §2281.

I. Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out Of State Milk Into Florida, In Violation Of The Commerce Clause Of The Federal Constitution.

A. General Principles.

The Commerce Clause of the Constitution of the United States favors open markets and a free flow of goods and services across State lines, and the disability of a State to isolate its own economy and pro-

tect its own inhabitants from competition is recognized. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, *Hood & Sons v. DuMond*, 336 U.S. 525.

B. The Actual Effect of Florida's Regulatory Scheme is to Reduce the Imports of Out of State Milk into Florida, to Enable the Florida Producers to Shift the Burden of Bearing their Fair Share of the Lower Surplus Milk Price onto the Out of State Sources of Supply, and to Save Florida Producers from All Effective Out of State Competition for Florida Distributor Outlets.

The Florida regulatory scheme requiring Polar to purchase all of the milk which its Florida producers deliver and pay a Class I price for such milk puts legal and economic pressures upon Polar to reduce its out of state purchases and acts as a barrier to the free flow of milk in a manner similar to the Federal Marketing Orders considered by this Court in *Lehigh Valley Coop. v. United States*, 370 U.S. 76.

The Pensacola Milk Marketing Area comprises a four-county area in the northwesternmost section of Florida, which is neither a natural milk shed, nor a natural marketing area, but is, instead, an artificial unit defined by boundaries which are economically arbitrary. The Pensacola area is a deficit area, and Polar buys only 30% of its milk there. Much of its other milk is obtained from nearby Alabama producers.

C. The Florida Regulatory Scheme is Both Unnecessary for the Protection of Any Legitimate State Interest

and, Even if Necessary, is so Great a Burden on Interstate Commerce that it is Invalid Under the Commerce Clause.

The Florida scheme is nothing more or less than "tariff" protection for Florida producers. The Florida regulations capture and hold open for the Florida producer as much of the prime portion of the Florida Market as he is willing and able to take.

Florida's scheme to block and burden imports demonstrates in a practical way a violation of the Commerce Clause. *Dean Milk Co. v. Madison*, 340 U.S. 349.

II. Florida Cannot Enforce Her Minimum Producer Price Regulations As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station, And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs Or Post Exchanges.

The Federal procurement policy, as enunciated in *Paul v. United States*, 9 L.Ed. 2d 292, forbids the enforcement of minimum producer price regulations as respects milk sold to the above military installations. The case of *Pacific Coast Dairy v. Dept. of Agriculture*, 318 U.S. 285, is authority for the inability of the State of Florida to enforce the minimum producer price regulations on military bases exclusive jurisdiction to which has been ceded to the United States. Federal procurement policy requires competitive bidding, as a

general rule, and a state regulatory scheme which would set minimum producer prices in conflict with such procurement policy is unenforceable. To regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

III. Florida Cannot Enforce Her Distributors Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base And Pensacola Naval Air Station, Exclusive Jurisdiction To Each Having Been Ceded To The United States In Accordance With Article I, Section 8, Clause 17 Of The Constitution Of The United States.

Florida is without jurisdiction to tax milk delivered to military reservations exclusive jurisdiction to which had been ceded to the United States. *Surplus Trading Company v. Cook,* 281 U.S. 647. *James v. Dravo Contracting Company,* 302 U.S. 134; *Standard Oil Company v. California,* 291 U.S. 242.

ARGUMENT.

I. Florida's Scheme For The Regulation Of Milk In The Pensacola Area Discriminates Against And Burdens The Flow Of Out-Of-State Milk Into Florida, In Violation Of The Commerce Clause Of The Federal Constitution.

A. General Principles.

One of the fundamental policies of the Commerce Clause of the United States Constitution is the policy

in favor of open markets and a free flow of goods and services across state lines. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 527 (1934), *Hood & Sons v. Du Mond*, 336 U. S. 525, 533-535 (1948).

This principle has, of course, found specific application in the milk field in the cases just cited. Although this court has approved economic regulation of the milk industry that might not be warranted in other industries and under different conditions, *Nebbia v. New York*, 291 U. S. 502 (1933), it has not yielded to demands that the special nature of the problems that in the past prevailed in the milk field be held to justify an exception to the policy in favor of interstate competition and open markets. *Baldwin v. G. A. F. Seelig*, 294 U.S. 511.

In the *Seelig* case, the court struck down provisions of the New York law which forbade the sale within the state of milk purchased outside the state at less than the New York producer price. Disposing of the state's suggestion that the prohibition was but an indirect burden upon commerce, the court said that such distinctions were irrelevant "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." The argument was of course made that the states needed power to control imports of milk in order to protect their farmers from the effect of competition which might drive them out of business and jeopardize New York's supply. Noting that the commerce clause was intended to end the

"mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation," the court observed that "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted" by the commerce clause. The court concluded, "peoples of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division."

The basic principles set forth in the *Seelig* case were affirmed in *Hood & Sons v. Du Mond*, 336 U. S. 525, (1948). This court there said:

> "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."
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> . . . . . .
>
> "This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled."

The basis for the policies so applied was expressed in these terms by the court:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

B. The Actual Effect of Florida's Regulatory Scheme is to Reduce the Imports of Out-of-State Milk into Florida, to Enable the Florida Producers to Shift the Burden of Bearing their Fair Share of the Lower Surplus Milk Price onto the Out-of-State Sources of Supply, and to Save Florida Producers from All Effective Out-of-State Competition for Florida Distributor Outlets.

Florida is a net importer of milk and the Florida producers in the Pensacola area do not supply enough milk to satisfy the demands of the area. (R 154.) See Milk Movement Patterns in the Southeast, Carley & Purcell, Bull. 84, So. Coop. Series, April 1962. There is competition between Florida and out-of-state milk in the Pensacola market but imports of milk do not (contrary to the apparent situation in *Seelig* where the court nonetheless forbade restrictions on imports) necessarily displace the milk of local producers and deny to them a market for their product.

However, in spite of the fact that imported milk does not automatically displace local milk, in a relatively free market there could be competition in Pensacola in at least three ways: Florida producers might increase their production and compete to enlarge their share of the total market served by Florida distributors; they might simply compete to hold their share of the market at a given price; or they might retain their current share of the total market to obtain for all of their sales the high Class I price and thereby seek to force their competitors' sales into the lower price surplus category.

The Florida regulatory scheme, if valid, would absolve Florida producers from the need to participate in any of these three varieties of competition, because this scheme guarantees to Florida producers that their Florida distributors will have to purchase *all* the milk which these Florida producers deliver and will have to pay for it at premium Class I prices up to the total amount of the distributors' Class I sales.

Obviously, the concomitant effect of such a scheme is that, because of the tight economic structure of prices and thin distributor margins, out of state producers, many of whom regularly supply milk to make up the deficit in the Pensacola area, will *pro tanto* lose their Class I sales. (R 144-146.) Stated otherwise, the burden of receiving low surplus prices for a fair portion of the milk delivered is shifted from the Florida producers on to the out of state sources.

The natural tendency of the Florida producers will of course be to expand their total deliveries up to and beyond the level of Class I sales. Yet, they will still be fully protected from any sort of competition, or from any efforts of out-of-state sources even to preserve the share of the market which those sources formerly had.

Such a plan, of course, puts legal and economic pressure upon Polar to reduce its out-of-state purchases. First, the base plan obliges Polar to accept from Florida producers an amount of milk equal to Polar's Class I sales and Sections 501.05(3) and 501.09(3)(a) oblige Polar to accept milk even beyond this amount.[2] (The Commission apparently will not even consider a distributor's request to cut down producer receipts until those receipts exceed 115% of Class I sales. (R 144.)) These increased Florida receipts will inevitably necessitate an equivalent decrease in out-of-state purchases. Second, as the Florida producers gradually take over all of Polar's Class I sales, it will become advantageous for Polar to purchase its additional requirements in Florida at Class II prices rather than at out of state prices which might well be higher.

That the Florida scheme is a trade barrier and that it discriminates against out of state milk is clear from *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962), where this court struck down a provision in a federal milk marketing order, issued under color of the Agri-

[2] Florida Dairy, Inc. v. Florida Milk Commission, 149 So. 2d 867.

cultural Marketing Agreement Act of 1937, having an effect identical to that of the Florida scheme. The close analogy between the policy of the Federal Act and that of the Commerce Clause and the fact that this court has found a federal plan, which is virtually identical in effect to the Florida scheme, to be a trade barrier, makes this holding a significant one for the case at bar.

In *Lehigh*, this Court considered a provision in a federal marketing order which required handlers of milk purchased from sources outside the marketing pool to make "compensatory payments" into the pool equal to the difference between the Class I and the Class III price. As this Court pointed out, "the sale for fluid use [Class I] of nonpool milk [out-of-area milk] in the marketing area displaced pool milk that might otherwise be used for this premium outlet." "A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers the blend price that they would receive if all outside milk were physically excluded and they alone would supply the fluid-milk [Class I] needs of the area." This resulted from the fact that compensatory payments into the pool completely made up for the loss to local producers of having their milk diverted from Class I into lower usages, an effect identical to that achieved by the Florida base plan.[3]

[3] A simple example will help to clarify this. Let it be assumed that a distributor has Class I sales of 100 gallons and Class II sales of 20 gallons. His Florida producers deliver one-half of his requirements of 120 gallons. The Florida plan would ensure that the Florida producers are paid at Class I prices for the 60 gallons which they deliver. If all of the

The *Lehigh* case has thrown in doubt provisions of federal orders which are virtually identical in effect to the Florida base plan in that they cause out-of-area milk to be allocated to lower classes and preserve the Class I market for pool producers. See Hutt, Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders, 37 U. Det. Law Rev. 565-567.

In regard to both of these plans for preserving the local Class I sales for local producers, however, it should be noted that they perforce have a *less* discriminatory effect than the Florida scheme. A glance at the map will confirm the fact that the four-county area to which Florida regulation applies is neither a natural milkshed nor a natural marketing area; but is instead an artificial unit defined by boundaries which are economically arbitrary. The Pensacola area is a deficit area and Polar buys only 30% of its milk there. Plainly, if a federal marketing area were in effect, it would encompass and, insofar as it had a protective effect, protect not only the Florida producers covered by the Florida scheme, but also many of the regular out-of-state producers who sell milk to Florida plants in Pensacola. The Florida producers would thus be denied preferential treatment over a number of out of

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distributor's milk were brought in from pool producers under a federal order, however, the Florida producer would receive, but for the compensatory payments, the Class I price for 50 gallons and the Class II price for 10 gallons, actually in the form of a blend price. The *Lehigh* case thus leaves the producer with a blend price which is reduced by the fact that the imported milk occupies part of the Class I market. The Florida scheme, however, would avoid this result, and, by closing off the Class I market to outside milk, discourage its import.

state sources and these sources would be given equal treatment in the allocation of Class I sales. In spite of the interstate character of a federal marketing order which naturally limits its discriminatory effects, this Court has held that at least one device virtually identical in effect to the Florida scheme violates the expressed policy of Congress.

The foregoing indicates that the effect of pricing and allocation upon movement of milk is, because of the economics of the industry, certain to be considerable. See also Reports of the Federal Milk Order Study Committee to the Secretary of Agriculture, October 1954, April 1962. Barriers to the Interstate Movement of Milk, Univ. of Ariz. Ag. Exp. Sta., Bull. 255, April 1954. Regulations Affecting the Movement and Merchandising of Milk, Ag. Mktg. Serv., Mktg. Research Rept. N. 98, U. S. Dept. of Ag. 1955.

In summary, it seems clear that the Florida regulatory scheme will inevitably have a powerful and restrictive effect upon interstate commerce and will foster all the economic evils which flow from such restrictions. The Commission has attached economic consequences to an artificial state line which runs through a large interstate milkshed, and is supporting for the benefit of local producers, the highest producer price in the nation. It thus insulates the producers from all of the natural effects which competition would have upon this price. In the economic context of prices and competition that prevails, an increase in Polar's cost for Florida milk, caused by a discriminatory al-

location, inevitably decreases Polar's ability to pay for out of state milk, quite apart from the effect of the statutes which force Polar to purchase Florida milk. The Florida producer thus has his distributor blocked in all directions and holds him in the position of a true captive market.

The consequences of this interference with the natural flow of commerce are high Florida producer prices with high cost to consumers and consequent reduction in Florida consumption, loss of markets for the Alabama producers and consequent aggravation of the surplus problem, development of new, unneeded, uneconomic capacity in Florida under an artificial stimulus and consequent misallocation of resources,[4] and, of course, serious cuts in distributor profits.

C. The Florida Regulatory Scheme is Both Unnecessary for the Protection of Any Legitimate State Interest and, Even if Necessary, is so Great a Burden on Interstate Commerce that it is Invalid Under the Commerce Clause.

It has been clear since *Baldwin v. G. A. F. Seelig* that there are few if any local interests sufficiently

[4] "The close relationship between interregional competition and all agricultural price and production policy can now be appreciated. If prices are supported at too high a level, desirable adjustments between products and between regions will be retarded. The situation will be further aggravated by controls imposed to hold production in line. Any 'barrier' interposed in interregional competition for any purpose, however worthy, will also have the effect of 'protecting' the sheltered areas from the full play of economic forces and will prevent the full use of less costly resources." Interregional Competition in Agriculture, Harvard University Press, Cambridge, Mass., 1951, Ronald L. Mighell and John D. Black, p. 314.

great to justify a restriction having the practical effect of blocking the access of out of state goods to a market. In this case it is obvious that there is no purpose here but to foster the economic welfare of local producers and preserve them from competition. Such local interests do not justify an offense against the policies of the Commerce Clause.

What is complained of here is what was done after the Commission, by a vote of the Florida producers, took control of the Pensacola area in November of 1961. Before that time Polar was not obliged to allocate all of its Class I sales to its Florida producers without regard to the percentage of its total sales which they supplied. It is thus the allocation of an unfair proportion of Class I sales, which relieves Florida producers of receiving a slightly lower "blend" price instead of a Class I price, that is at the root of the discrimination in this case.

The state has seized for its producers the difference between the "blend" and the Class I price and is preserving it for them by means of the provisions which tie the distributors to the Florida producers. Insofar as out of state milk is bound to come in to fill the Pensacola deficit, Florida's action is a scheme for shifting a share of the distributors' payments from out of state to Florida milk. This is nothing more nor less than "tariff" protection for Florida producers. The Florida regulations thus capture and hold open for the Florida producer as much of the prime portion of the Florida market as he is willing and able to take. This

purpose, being inevitable, is presumptively intended, and Florida thus intends to give local producers the benefit of a milk tariff. There is no legitimate state objective behind such state interference with commerce, but even if such an objective could be asserted, it could surely be accomplished by less burdensome and discriminatory means and hence avoid the constitutional infirmities of the present scheme. *Dean Milk Co. v. Madison*, 340 U. S. 349, 354 (1950).

Although Florida's scheme to block and burden imports inevitably operates only upon a portion of such imports, reflecting the Commission's avoidance of methods superficially more clearly in violation of the Commerce Clause, this does not remove the constitutional infirmity. By the coincidence of state boundaries, Polar is in Florida and is regulated by the Florida Commission although it serves the same interstate market as Alabama distributors who also sell milk in Florida (R 127-128). Alabama milk and milk from other states can be and is thus sold in Florida not subject to the burden of unfair allocation placed upon Alabama milk imported through Florida distributors. Polar might thus compete, in the sale of Alabama milk, with an Alabama distributor just 16 miles away, but because of the existence of the state line, Polar would be obliged to allocate lower class sales to Alabama producers (causing discrimination between them and the producers of the Alabama distributor), or pay them high prices not in accord with the allocation system forced upon Polar by Florida (thus causing loss to Polar and a competitive disadvantage with the Ala-

bama distributor). If the Commerce Clause clearly requires Florida to leave the door open to Alabama imports through Alabama distributors, as it does, why should it permit Florida to close the door to Alabama imports through Florida distributors?

In view of the foregoing, there is no legitimate reason to preserve the state scheme and every reason to prefer the policies of the Commerce Clause over it.

The only difference between this case and the *Seelig* case is one of means to accomplish an end. In the economic context prevailing in the Pensacola area, it is perfectly clear that the practical effect of the Commission's regulations is to strike a severe blow to producers who supply, through Florida distributors, the milk which the Pensacola area must draw from outside the state. This is done to favor local producers. The effect was the same in *Seelig*, and the difference in means need not be of concern. As this Court has said in *Lehigh*, it is undesirable, even in areas regulated under federal marketing orders, for trade barriers to be set up "under the guise of price fixing regulation." It does not matter what form they may take. The practical effect upon commerce is the test for determining whether they are in violation of the Commerce Clause. *Dean Milk Co. v. Madison*, p. 354. It is likewise of no consequence that the discrimination against out of state goods does not appear on the face of the orders involved and operates also against Florida producers not affiliated with the distributor in question; see *Dean Milk Co. v. Madison*, footnote 4, p. 354. Again, it

is the practical effect that counts, for the Commerce Clause is concerned with the realities, not the theory, of a free flow of goods.

The dangers of protectionist regulations are particularly strong where, as here, the local producers make the decision as to whether the Commission will regulate and play a large part in its actions. It is indeed true that "provincial interests and local political power are at their maximum weight in bringing about acceptance" of a plan of this sort, *Nippert v. City of Richmond*, 327 U. S. 417, 434. The situation is analogous to a scheme under which the power to bring about a federal tariff might be delegated to the members of the industry desiring protection. The prohibition against state tariffs implicit in the Commerce Clause is doubly important to our national welfare where the state tariff is invoked by the vote of the special interests which it is designed to protect.

This sort of protectionism, as has been noted, is in conflict with the policies of the Commerce Clause. It has, moreover, in the specific form in question in this case, been held also to violate Congressional policy, as exemplified by the trade barrier clause of the Agricultural Marketing Agreement Act of 1937, U.S.C. § 608C(5)(G); *Lehigh Valley Coop. v. United States*. Thus, unlike *Parker v. Brown*, 317 U. S. 314, where it was successfully urged that the state regulatory

scheme was justified on the ground that it paralleled federal policy and was approved by the Secretary of Agriculture, Florida's exclusionary base plan is, in effect, identical to a scheme held to violate the Federal Act.

The Constitution and federal policy as declared by Congress thus unite in condemning a radical and discriminatory base plan of the sort which Florida has adopted, even without the added burden of a statute tying the distributor to his local producers. Florida's protectionist motive is clear, its restrictions on commerce are unrelated to any legitimate objective and there is hence no reason why such an obstruction to competition between the states should be allowed to continue.

II. Florida Cannot Enforce Her Minimum Producer Price Regulations As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base, Pensacola Naval Air Station, And United States Navy Mine Defense Laboratory At Panama City, Florida, And Used For Strictly Military Consumption, For Resale At Federal Commissaries, And For Consumption Or Resale At Military Clubs Or Post Exchanges.

The case of *Paul v. United States*, 9 L.Ed.2d 292, and *Pac. Coast Dairy v. Dept. of Agri.*, 318 U.S. 285, together with *Public Utilities Com. of Calif. v. United States*, 355 U.S. 534, and *United States v. Georgia Public*

Service Com., 9 L.Ed. 2d 317, are dispositive of this question.

In *Paul v. United States*, the question of whether the California regulatory scheme for the enforcement of minimum wholesale price regulations applied to milk sold to the United States and used for strictly military consumption at three Air Force bases over which the United States had exclusive jurisdiction was squarely considered. This Court held that as to milk used for strictly military consumption and for resale at Federal commissaries, the Federal procurement policy which required competitive bidding as the general rule prevailed over the California regulatory scheme which eliminated competition and defeated the command to Federal officers to procure supplies at the lowest cost to the United States.

As to milk purchased out of non-appropriated funds for use in military clubs and for resale at Post Exchanges, the time of the acquisition of the lands by the United States was determinative as to whether or not price control laws of California would be applicable.

Florida has a minimum producer price of 61¢ per gallon, and E. V. Fisher, Florida Milk Commission Administrator, at trial testified (R 147, 148) as follows:

> "Q. Now, Mr. Fisher, suppose the Polar Ice Cream Company should sell 100,000 gallons of milk under a bid to [fol. 210] a military installation, such as Eglin Field or Ft. Benning, Georgia, would

that milk be classified under your classification system as Class 1?

A. No, sir, that would be military milk.

Q. Excuse me, do you have any special classification except for Polar's producers for military milk? Today, I am talking about today, in the Pensacola milk marketing area?

A. If they used producer milk that would be Class 1, yes, at 61¢ a gallon.

Q. And you would require the Polar Company then to account to the producers for that milk sold to Ft. Benning camp just as Class 1 milk and you would take that percentage up to these people named and you would count that in your auditing computation?

A. It takes the Classification of Class 1 milk, it is for human consumption, and we would take that in if they used their producers milk.

[fol. 211] Q. It would be 61¢ a gallon?

A. Yes, and they know that when they use it.

Q. We all know it, don't we? We all know it?

A. You do."

Each of the four military installations in question will next be considered.

FORT BENNING, GEORGIA

The contract of Polar to furnish milk and dairy products to Ft. Benning, Georgia, (Pl. Ex. 1, R 124, 193) was the largest of the contracts, with an award being made on August 14, 1961, in an estimated amount of $1,491,110.80 (R 195). The Invitation for Bids provided

for sealed bids, which were to be opened at Ft. Benning, Georgia (R 194). The procurement authority was Title 10, U.S.C. §2304(a). (R 194). The unit price for milk delivered in three or five gallon containers was 58¢ per gallon (R 209).

Exclusive jurisdiction to Fort Benning, Georgia, reservation was ceded to the United States (Pl. Ex. 3, R 126, 295, 314, 316, 317).

TYNDALL AIR FORCE BASE, FLORIDA.

The Polar contract with Tyndall Air Force Base, Florida, was placed into evidence. (Pl. Ex. 2, R 124, 244.) This contract called for sealed bids; to be opened on the base, for the supplying of dairy products for troop issue (R 244), and provided, among other things, for Polar to furnish 98,000 gallons of fresh, whole milk at a unit price of 60¢ per gallon.

Exclusive jurisdiction was ceded to the United States, upon its application in writing, by Deed of Cession, dated January 7, 1943 (Pl. Ex. 3; R 126, 318-326). The Deed of Cession saved to the State of Florida concurrent jurisdiction for the service of process and saved to the United States security to its property and exempted the same from taxation under the laws of the State of Florida while the property was owned and occupied by the United States for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dockyards

and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States. (R 318, 334.) Acceptance of the Cession of Jurisdiction by the United States was by letter from Henry L. Stimson, Secretary of War, dated February 1, 1943. (R 297.)

PENSACOLA NAVAL AIR STATION.

The President of Polar testified that it had a contract for the delivery of milk to the Officers' Club and the Naval Exchange at the Pensacola Naval Air Station R 124). The United States has exclusive jurisdiction to the Pensacola Naval Air Station by virtue of deed of cession, dated October 13, 1856, from James E. Broome, Governor of the State of Florida, to the United States of America. (Pl.Ex. 3, R 126, 294, 312.)

U. S. NAVY MINE DEFENSE LABORATORY PANAMA CITY, FLORIDA.

Polar had a contract with U. S. Navy Mine Defense Laboratory (R 124, 272) for furnishing milk at a unit price of 60¢ per gallon.

The record is incomplete as to whether or not exclusive jurisdiction of this facility has been ceded to the United States, and whether or not the contract was for the furnishing of milk to be used for troop issue, but these matters could be resolved upon a remand to the District Court.

The rule laid down by this Court in *Pacific Coast Dairy v. Department of Agri.*, 318 U.S. 285, which was approved in *Paul v. United States*, 9 L.Ed.2d 292, squarely fits the factual situation of this case, insofar as milk delivered to Fort Benning, Georgia, is concerned. This enclave, is located without the State of Florida, and the activities of the United States, as respects the milk to be delivered there, all took place outside the territorial limits of the State of Florida, and on the military enclave to which the United States had been ceded exclusive jurisdiction. The contract was executed pursuant to the procurement authority found in 10 U.S.C. §2304(a). Sealed bids were received and opened at Fort Benning, Georgia, and the award was made in Georgia, and the dairy products which were the subject matter of the contract were delivered to Fort Benning, Georgia.

As to the Fort Benning contract, the State of Florida has no jurisdiction to impose the minimum producer price regulations against Polar. *James v. Dravo Contracting Co.*, 302 U.S. 134.

Tyndall Air Force Base, Florida, is also a military enclave, exclusive jurisdiction to which has been ceded to the United States, and cession of jurisdiction has been accepted by the United States. Polar's contract for the delivery of dairy products for troop issue to Tyndall Air Force Base was awarded after opening of sealed bids.

In the *Pacific Coast Dairy* case, this Court held that:

> "Contracts to sell and sales consummated within the enclave cannot be regulated by the California law."

(318 U.S. at 294.)

The Court also rejected the contention of California that the California Milk Act regulates only the conduct of California citizens within its own territory; that it is the purchasing, handling and processing by Pacific Coast Dairy in California of milk to be sold below the fixed price—not the sale on Moffett Field . . . which is prohibited, and entails the penalties prescribed by the statute. The Court found that the argument was without application because of the authority granted the Federal government over Moffett Field. 318 U.S. at 295.

The same rule would be now applicable to the argument that the State of Florida can regulate minimum producer prices, even though the sale of milk was on a military enclave exclusive jurisdiction to which had been ceded to the United States.

Polar's contract for delivery of milk to the Officers' Club and the Naval Exchange at the Pensacola Naval Air Station would be determined by the legislation in existence at the time exclusive jurisdiction to this area was ceded to the United States. The date of that deed of cession was October 13, 1855 (R 294, 312), which was

long prior to the passage of the first Florida Milk Act, which was in 1933.

This Court, in *Paul v. United States*, 9 L.Ed. 2d 292 said:

> "Since a state may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws."

It, therefore, follows, that because no Florida milk price control laws were in force at the time the United States acquired the land at the Pensacola Naval Air Station, sales made on that enclave would likewise be governed by *Pac. Coast Dairy v. Dept. of Agri.*, 318 U.S. 285.

This Court considered the Federal procurement policy and the pertinent provisions of the Armed Services Procurement Act, together with the Armed Services Procurement Regulation, in *Paul v. United States*, 9 L.Ed. 292, and in distinguishing the *Paul* case from *Penn Dairies, Inc. v. Milk Control Com.*, 318 U.S. 261, found that the command of the present regulation is that purchases for the Armed Services be made on a competitive basis, and that California's price fixing policy for milk was as opposed to this Federal procurement policy as was California's rate making policy in

Public Utilities Com. of Calif. v. United States, 355 U.S. 534.

It is recognized that a state may attempt to regulate the activities of the Federal government without verbally addressing its commands to a class, including the United States or its agents. It is the activities of the United States, and not its agents, that must be free from interference. Included among those activities is the Federal government's exercise of its power to contract. The Federal regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the government—price, quality and other factors considered." *Armed Services Procurement Regulation, Pt. 1, ¶301.*

Competitive bidding is the cornerstone of the policy, as exemplified by 10 U.S.C. 2304(a), which provides that purchases of and contracts for property or services shall be made by competitive bidding through formal advertising or by negotiation, but there is a clear mandate to use the method of procurement which will be most advantageous to the Government, price, quality and other factors considered. The fixing of minimum producer prices by the State of Florida would directly result in an interference with the procurement policy of the United States and would conflict with the procurement policy. Polar's contract for delivery of milk to Fort Benning provided that the same should be delivered at a unit price of 58¢ per gallon. Likewise, the contracts to deliver milk to Tyndall Air Force Base and to the U. S. Navy Mine Defense Laboratory were for

delivery at a unit price of 60¢ per gallon. It is thus apparent that the enforcement of a Florida regulatory scheme which would require Polar to pay a minimum price of 61¢ per gallon to its Florida producers would eliminate Polar and other Florida distributors who used Florida milk from bidding on similar contracts.

In determining whether an attempted State regulation of the terms of a contract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of the sellers of goods or services. In determining what is "direct", in defining the immunity, this Court goes beyond the bare face of the statute to consider all relevant circumstances. *United States v. City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

III. Florida Cannot Enforce Her Distributors Privilege Tax As Respects Milk Sold To The United States At Fort Benning, Georgia, Tyndall Air Force Base And Pensacola Naval Air Station, Exclusive Jurisdiction To Each Having Been Ceded To The United States In Accordance With Article I, Section 8, Clause 17 Of The Constitution Of The United States.

The pertinent portion of Chapter 501.09(4)(b), Florida Statutes, which relates to the tax on the distributors, is as follows:

"For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter".

The foregoing tax is in addition to any license fees or ad valorem taxes required to be paid by the distributor.

Fort Benning, Georgia, Tyndall Air Force Base, Florida, and the Pensacola Naval Air Station at Pensacola, Florida, are all military bases exclusive jurisdiction to which was acquired pursuant to the authority of Article I, §8, Clause 17 of the Constitution of the United States.

The case of *Surplus Trading Company v. Cook*, 281 U.S. 647, recognized the principle that as to land acquired for the purposes named in the foregoing constitutional provision, the Federal jurisdiction is exclusive of all State authority.

In *James v. Dravo Contracting Company, supra*, a suit was brought to enjoin the collection of a gross

receipts tax by a contractor with the United States for the construction of locks and dams in the Ohio River. The tax in question was in the nature of a privilege tax, equal to 2% of the gross income of the business, levied upon every person engaging within the State in the business of contracting. A portion of the contractor's work was performed at its plant in Pittsburgh. Some of the work was performed within the State of West Virginia on property exclusive jurisdiction to which had been ceded to the United States. This Court held that it was clear that West Virginia had no jurisdiction to lay a tax upon the contractor with respect to work done in Pennsylvania, and that as to work done within the exterior limits of West Virginia, the question was whether the United States had acquired exclusive jurisdiction over the respective sites.

> "Whenever the United States has such jurisdiction, the State would have no authority to lay the tax. Surplus Trading Co. v. Cook, supra."

302 U.S. at 140.

In the case of *Standard Oil Company v. California*, 291 U.S. 242, a California gallonage tax on gasoline delivered to a Post Exchange located within the Presidio of San Francisco, exclusive jurisdiction to which had been ceded to the United States, was struck down by this Court, and it was held that the State of California was without power to impose taxes in respect of sales and delivery made to such Post Exchange. The Court further said:

> "A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

The Supreme Court of the State of Florida, in *International Business Mach. Corp. v. Vaughn*, 98 So. 2nd 747, recognized the foregoing principles when an attempt to tax computing machines located at Eglin Field was challenged. The Court said:

> ". . . that the deed of cession vested in the United States exclusive jurisdiction * * * and that jurisdiction cannot be disturbed by tax gatherers because the right to tax was not reserved and the consent of the United States to tax was not given."

The District Court held (R 183) that the tax was in the nature of a regulatory fee and was not a tax on milk. It completely overlooked the application of the Supremacy Clause to the tax in question, but from the foregoing cases, it is clear that Florida was without jurisdiction to enforce the tax on the milk delivered to military reservations exclusive jurisdiction to which had been ceded to the United States

CONCLUSION.

For the foregoing reasons, the Judgment of the District Court should be reversed with directions to enter a Decree granting appropriate relief to the Appellant.

Respectfully submitted,

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PROOF OF SERVICE.

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of August, 1963, I served a copy of the foregoing Brief, together with Appendices, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, and MALLORY E. HORNE, of Horne & Rhodes, 102 1/2 South Monroe Street, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.

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